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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 657

PACIFIC FAR EAST LINE, INC., *Petitioner*

v.

THE GOVERNMENT OF GUAM, *Respondent*

REPLY TO THE BRIEF IN OPPOSITION

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1. Respondent's effort to harmonize the decision below with *Alaska S.S. Co.* v. *FMC*[1] emphasizes the conflict between them. In both cases the Commission had made substantially the same findings as to the carriers' working capital needs, namely, that working capital is necessary to cover cash requirements for various unpredictable events such as accidents, lay-ups, strikes, and the lag between cost increases and rate increases. In neither case had the Commission met the requirement that the court below did, but the Ninth Circuit did not, impose—that the findings state how many dollars were needed for each of these sev-

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[1] 344 F.2d 810, 823-25 (9th Cir. 1965).

eral contingencies, and the "sources" of these dollars. Instead, the Commission had relied on its experience in prior cases in the off-shore domestic trades that the round-voyage-expense formula expressed in Limitation (4) of General Order No. 31 produces a working capital limitation reflecting with sufficient accuracy the needs of the carriers in these trades. (The Commission regards these trades as similar, as they all involve regularly scheduled non-subsidized service from the mainland of the United States to the off-shore states, territories, and possessions).[2]

The Ninth Circuit held these findings adequate; the court below holds them inadequate—a square conflict. Respondent obfuscates the matter when it suggests (Br. in Opp., p. 7) that in the *Alaska S.S. Co.* case the Commission gave weight to findings which respondent implies had been made in an earlier investigation of Alaska Steamship Co.'s rates.[3] That earlier Alaskan investigation did not produce findings of the kind demanded by the court below in the present case; on the contrary, in the earlier investigation the Commission had merely made findings indistinguishable from those upheld by the Ninth Circuit in the recent *Alaska S.S. Co.* case and overturned by the court below in this case. Indeed, in the earlier Alaskan investigation the Commission had simply relied upon its similar findings in a still earlier case in the Puerto Rico trade. See *General Increase in Alaskan Rates and Charges, supra* n. 3, at 582. In both the *Alaska S.S. Co.* case and the present case the question was whether the Commission may rely upon find-

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[2] In the *Alaska S.S. Co.* case the Commission referred to the seasonality of the Alaska trade. But that is not a basis of distinction between the two cases, for the seasonality would have tended, if anything, as Alaska Steamship Company urged, to support a larger working capital than Limitation (4) permits; yet the Commission adhered to the formula.

[3] General Increase in Alaskan Rates and Charges, 7 F.M.C. 563 (1963).

ings of this character in invoking the round-voyage-expense formula.

2. a. Respondent's suggestion in a footnote (Br. in Opp., p. 10) that the petition is untimely as to Question 2 (relating to Guam's lack of standing to invoke the jurisdiction of the court below) is unfounded. This Court may now consider all substantial questions determined in the earlier stages of the litigation, including those disposed of by the court below in the first review proceeding. *Reece* v. *Georgia*, 350 U.S. 85, 87 (1956); *Urie* v. *Thompson*, 337 U.S. 163, 171-73 (1949). This rule was applied at the last term in *Consolo* v. *FMC*, 383 U.S. 607 (1966), where the Court decided, on certiorari to the court of appeals in a second review proceeding, questions as to the jurisdiction of that court to entertain an earlier review proceeding that had resulted in a remand to the Commission. That case is on all fours with this. The *Minneapolis-Honeywell* and *Idaho Power* cases cited by respondent concerned the time for filing a petition when the judgment of which review is sought has been or may have been modified; no modification of a judgment is involved in this case.

b. While conceding that its interest before the court of appeals was that of *parens patriae* to its constituents, respondent now asserts that it also appeared in some other capacity, characterized by it as "proprietary" (Br. in Opp., p. 11). There is neither a word of evidence nor an allegation in any pleading in the record that the respondent government of Guam ships or receives so much as a pound of cargo under the rates which it asked the Commission to investigate. Respondent therefore has no "proprietary capacity" in this case; its use of that phrase is merely an argumentative way of alleging (but not proving) that as a government it is affected financially by rates paid or borne by its constituents. That kind of effect is precisely the kind deemed inadequate to confer standing upon a governmental body or administrative agency in the prior decisions of this Court cited in the petition (pp. 11-15).

Conclusion

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 21, 1966

Certificate of Service

I certify that I have served the foregoing Reply to the Brief in Opposition upon all parties of record by mailing copies to the Solicitor General, to the General Counsel of the Federal Maritime Commission, and to Eugene L. Stewart, Esquire, 1001 Connecticut Avenue, Washington, D. C., 20036, attorney for respondent, this 21st day of December, 1966.

MARK P. SCHLEFER